STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2014
v	No. 316459 Ingham Circuit Court
RAMZY ABDUL HRRAHMAN, Defendant-Appellant.	LC No. 12-000656-FH

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant was found guilty of second-degree home invasion, MCL 750.110a(3), following a bench trial. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 120 to 300 months' imprisonment. He appeals as of right, and for the reasons set forth in this opinion, we affirm.

I. BACKGROUND FACTS

Dawn Davis testified that, in May 2011, her mother, Violet Davis, was 94 at the time of the trial and living with Davis at her house on Jolly Road in Lansing. On May 7, Davis left her house at approximately 10:30 a.m., as was her usual practice on Saturdays, taking her mother to "get her hair done . . . ." When Davis returned to her house, she saw that her side door was open and that a window next to the door was broken.

Davis testified that her "mother's wedding rings that was sitting on her night stand, and then all the jewelry that was in the safe" were stolen as well as a class ring and personal photographs were also taken. Additionally she noticed that a safe was removed from a room and transported into a hallway. Numerous other items were also missing from her home.

Officer Rachel Bahl testified she "responded to" Davis' house in May 2011. Bahl also testified, "There was an interior side door that was damaged." After talking to "the victim," she "began to take photos of the scene and process the scene by looking for fingerprints."

Kenneth Lucas testified that he is a "fingerprint technician," and was qualified as an expert witness. Lucas testified that he compared defendant's known fingerprints that Officer Jason Davis had taken from defendant after the incident, with the ones Bahl had taken at the scene of the crime. In his opinion, two of the latent prints belonged to defendant.

Defendant testified that on the morning of May 7, 2011 he was drinking alcohol when Edward Washington came to his house. He testified that Washington had been his supervisor at a previous job and they had been friends. Defendant testified that he agreed to help Washington move some items that day in exchange for some drinks and marijuana. Defendant testified, "I got in the van with him, his van. . . . And he drove me to that home on Jolly." Defendant testified that Washington told him he "needed to pick up some of his stuff."

After Washington entered the dwelling, defendant testified that he walked "five steps up into the house," but "did not see the door kicked in at all." When asked what he helped Washington move, defendant answered " . . . a safe." Defendant later testified, "I only remember going into the living room. I did go up the steps to get the two bags." Defendant testified that he believed that they had been at the house for "perhaps 10 minutes, 15 minutes." Some days later, when defendant attempted to pawn some items not related to the larceny from the Davis residence, the pawn broker told him he could not accept anything from defendant because he had previously pawned a stolen ring. According to defendant, this was the first time he learned that the items taken from the Davis residence were stolen. He testified he confronted Washington about this fact, who denied it, and at the date of trial defendant had no idea as to the whereabouts of Washington.

Following the close of proofs, the trial court gave its verdict, in relevant part, as follows:

> Now, the elements of this charge are that someone broke into a building. It doesn't matter what was broken or what wasn't, but it's fairly clear in this case there is a broken window to the downstairs which may or may not have been a point of entry. There's clearly an inside door that frankly you would have to have been blind, absolutely blind not to have seen. I could see someone missing the other, but we have a door, Exhibit 3, that has the entire left side of the door smashed and broken off from the framework. I am not even clear if there is a door left, but I've got to say, you would have to be blind not to have seen that at some point. So it does seem to me there is clearly evidence of a breaking in this case.
>
> Secondly, that the Defendant entered this dwelling. By his own testimony he acknowledges he entered the dwelling. There is certainly plenty of other evidence, primarily, of course, his fingerprints found in the bedroom of the one lady's mother on an empty plastic box that the Court cannot fathom any reason why that box would have been somewhere else and then transported up there. The actual fact is, is that box was where jewelry was normally kept, so its location was fairly obvious. So it's fairly clear the Defendant was in that room and had his hands on that box.
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> And thirdly, just based upon the way things were moved around and scattered and what have you, it's fairly obvious that there was an attempt to commit a crime in that dwelling when it was entered by the Defendant . . . .
>
> Now, when we examine fingerprint evidence, one of the caveats says, it's very important that when you examine fingerprints, that you make sure they are

> the proper prints. And of course, I find beyond a reasonable doubt they are in this case. And also, that they be found in a place and under circumstances where they could only be there when the crime was committed by the person. We have your client having never been in this house, never having met these people, having his prints found in the bedroom of a 96 year old woman, who, by the way, had her wedding rings, 96 years old had her wedding rings stolen. That seems to me to meet every standard of that section as to your client and those prints being there.
>
> For all the reasons I've stated on this record, the Court finds the Defendant is guilty of this breaking and entering in this particular case.

At sentencing, the prosecution argued that Offense Variable (OV) 16 should have been scored higher than the presentence investigation report (PSIR) suggested:

> As to OV16, which is currently scored at 5 points, we believe it should be scored at 10 points being that some of the property that was stolen did have significant sentimental value given. That it was wedding rings of the elderly woman that had lived at the home we believe it does fall within that scoring so we would ask that that be 10 points rather than five.

Defendant disagreed, stating, "We would object to that, Your Honor. We believe it's properly scored at five points." The trial court responded, "I think it's 10, absolutely."

Following a remand by this Court, this appeal ensued.[1]

On appeal, defendant first argues[2] that offense variable (OV) 16 was improperly scored. "The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo." *People v Portellos*, 298 Mich App 431, 446; 827 NW2d 725 (2012). "[T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 16 addresses property obtained, damaged, lost, or destroyed. MCL 777.46(1). Under that variable, 10 points must be assessed if "the property had a value of more than $20,000 or had significant historical, social, or sentimental value." MCL 777.46(1)(b). The trial court scored 10 points under this variable because it found that wedding rings that defendant stole had significant sentimental value to their owner. We concur. From the PSIR, the trial court could glean that the rings were purchased in 1943, meaning that the victim had retained the wedding rings for 68 years. We cannot conceive of an item that would have as much sentimental value to

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[1] *People v Hrrahman*, unpublished order of the Court of Appeals, entered November 15, 2013 (Docket No. 316459).

[2] Two of defendant's issues were resolved on interlocutory remand to the satisfaction of both parties and, therefore, are moot.

a 94 year-old widow then wedding rings she retained for 68 years. Accordingly, we find no error.

Defendant also raises several issues in a Standard 4 brief. First, he argues that he was arrested illegally and, therefore, his conviction must be reversed. Assuming that defendant's arrest was somehow illegal, it does not follow that his conviction must be reversed. "The rule, in fact, is that an unlawful arrest does not prevent the prosecution of a defendant." *People v Carroll*, 49 Mich App 44, 46; 211 NW2d 233, 234 (1973). See also *Gerstein v Pugh*, 420 US 103, 119; 95 S Ct 854; 43 L Ed 2d 54 (1975) (recognizing as an "established rule that illegal arrest or detention does not void a subsequent conviction"). In addition, to the extent that defendant argues that the fruits of his allegedly illegal arrest should have been suppressed, he fails to identify these fruits. Moreover, even if such fruits exist, the prosecution only relied on evidence from the scene of the crime at trial.

Defendant also argues that his right to self-incrimination was violated because the trial court and his counsel failed to advise him of that right and elicit a waiver on the record. This argument is contrary to settled caselaw. "[A]n on-the-record waiver of [a] defendant's right to testify" is not required before he testifies. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). Rather, "an accused's decision to testify or not to testify is a strategic decision best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Furthermore, defendant does not allege that he was unaware of his right against self-incrimination. Indeed, defendant alleges he invoked the right to end a police interrogation and it appears that he invoked it in a motion for a new attorney before trial. Similarly, defendant does not contend that he would not have testified, or that the outcome of the proceedings would have been different had he chosen not to testify. Accordingly, we assign no error.

Defendant next argues that there was insufficient evidence to sustain the verdict. When examining whether there was sufficient evidence to support a conviction, we review the evidence de novo in a light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). In reviewing the sufficiency of the evidence, this Court must not interfere with the role of the trier of fact in determining "'the weight of the evidence or the credibility of witnesses.'" *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

MCL 750.110a(3) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a

> person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

The trial court first found that defendant had broken into the house based on a broken window and a broken interior door. It found that defendant had entered the house because defendant admitted he had entered it and his fingerprints were found on a jewelry box. Finally, the trial court found that defendant had the intent to commit a felony because "just based upon the way things were moved around and scattered and what have you, it's fairly obvious that there was an attempt to commit a crime in that dwelling when it was entered by the Defendant." The trial court discredited most of defendant's testimony, other than his admission that he had entered the house. This was within the trial court's purview because, at a bench trial, the court as the trier of fact evaluates witness credibility. *People v Jackson*, 178 Mich App 62, 64; 443 NW2d 423 (1989).

We find that the trial court's findings were sufficient to sustain its verdict. Evidence that a basement window had been broken and that a door had been kicked in were clearly sufficient to establish a breaking. Evidence that defendant's fingerprints were found on a jewelry box was likewise sufficient to establish that defendant had in fact entered the house, but even if they were not, defendant admitted he entered the house. Defendant admitted removing items from the house. Finally, it is clear that the house was in a state of disarray when the owner returned, which evinced an intent to commit a larceny. The owner also testified that several items were, in fact, stolen.

Defendant primarily takes issue with fingerprint evidence presented at trial. He argues that a sufficient chain of custody was not established. However, any break in the chain of custody "does not require automatic exclusion of the evidence." *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). Rather,

> [t]he threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility. [*Id.*]

The officer who took latent fingerprints at the scene of the crime identified them at trial. Another officer identified fingerprints he took from defendant. The fingerprint identification expert then identified those prints as the ones he compared. We find that this was an adequate foundation. Moreover, defendant admitted that he touched the jewelry box.

Defendant also argues that he did not receive a forensic report regarding the fingerprint identification expert's analysis pursuant to MCR 6.202. That rule provides in pertinent part:

> Upon receipt of a forensic laboratory report and certificate, *if applicable*, by the examining expert, the prosecutor shall serve a copy of the laboratory report and certificate on the opposing party's attorney or party, if not represented by an

> attorney, within 14 days after receipt of the laboratory report and certificate. [MCR 6.202(B) (emphasis added).]

In this case, it does not appear that a forensic laboratory report and certificate was prepared. Hence, MCR 6.202 was not applicable.

Defendant also advances arguments related to evidence from a pawn shop. However, it was defendant, not the prosecution, who offered this evidence. Although it is true that a ring was not produced at trial and there was no direct evidence that the ring that defendant pawned had been stolen, the trial court did not rely on any evidence regarding the pawn shop to find defendant guilty.

Defendant argues fourth that his first appointed counsel rendered ineffective assistance by allowing police to interview him outside counsel's presence. The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee the right to effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "'Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.'" *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Without deciding whether counsel rendered deficient performance, we find that defendant has not established prejudice. The prosecution did not use defendant's statement from the interview in its case-in-chief, or to cross-examine defendant. Nor does it appear that the prosecution used any evidence gleaned from the interview. Consequently, we find that there is not a reasonable probability that the outcome would have been different if defendant's counsel had accompanied him at the interview. Accordingly, defendant is not entitled to relief on this issue.

Lastly, defendant argues that the 180-day rule and his right to a speedy trial were violated. Defendant argues that the 180-day rule was violated because he was incarcerated for 204 days before trial. The 180-day rule is found in MCL 780.131, which provides, in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of

> imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. [MCL 780.131(1).]

If the prosecution fails to commence an action within 180 days after receiving notice from the Department of Corrections, the trial court is divested of jurisdiction and must dismiss the case with prejudice. MCL 780.133.

As the plain language of the statute indicates, the predicate for application of the 180-day rule is notice from the Department of Corrections to the prosecution. *People v Rivera*, 301 Mich App 188, 192; 835 NW2d 464 (2013). In the present case, defendant does not allege, and the record does not indicate, that such notice was ever given. "Thus, the 180–day rule was never triggered, so it could not have been violated." *Id*.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution. *Id*. at 193. "Whether an accused's right to a speedy trial is violated depends on consideration of four factors: '(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant.'" *Id*., quoting *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). The length of the delay is measured from the date the defendant was arrested. *Id*. Although there is no set number of days after which the right is violated, "[w]hen the delay is more than 18 months, prejudice is presumed," and "[w]hen the delay is less than 18 months, the defendant must prove that he or she suffered prejudice." *Id*.

Applying the four factors to the case at hand, defendant was arrested on June 25, 2012 and his trial was held on January 14, 2013, a delay of less than 18 months. Regarding the reason for the delay, the trial court stated that the trial had been delayed in part due to defendant's request for a new attorney. Thus, it appears that the delay was in part attributable to defendant. Defendant does not allege that any delay was attributable to the prosecution. Regarding defendant's assertion of the right, it appears that defendant raised this issue only once at the beginning of trial. Finally, defendant does not argue that any delay was prejudicial. Consequently, we find that defendant has not established that he was deprived of his right to a speedy trial.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello